It is well-established that there must be a guarded approach to ex post facto crying or distress as evidence of corroboration - see, for example, *R* v *Wilson*[3] - because distress might result from other causes dissociated from the alleged offence; or the complainant 'might be putting on an act or simulating distress' - the words of Lord Parker CJ in *R* v *Redpath*.[4] That the learned trial judge warned himself of the danger is manifest. In doing so, he adopted Lord Parker's phraseology:

> Jackie's mother had found her in a distressed state barely a few hours after the rape. The circumstances under which the mother found her did not suggest that Jackie was putting on an act and was simulating distress. Her mother had found her crying in the bedroom and, when questioned, had refused to tell the mother what had happened because she was too ashamed to do so. Jackie's distressed condition lent support to her story of being raped.

It is right to observe, in any event, that the trial judge seems to have concluded, by the use of the words lent support to the story that the evidence of distress fell somewhat short of corroboration, in the accepted sense of confirmation, and amounted to little more than evidence of consistency.

Counsel for the appellant conceded at the outset of his argument that he had a considerable task ahead of him in the appeal against conviction, for the reason that the learned judge found the complainant to be a witness of truth and the appellant to be a liar. We were obliged to agree, and determined at the conclusion of argument that the task was one which counsel had been unable to accomplish. The appeal against conviction was accordingly dismissed.

We gave anxious consideration to what was said on the appellant's behalf in the appeal against sentence. There had been no violent assault, no weapon, no threats; the complainant was a worldly young woman, the relationship between her and the appellant prior to the offence had been pleasant and easy-going; they had been drinking; and the appellant had driven her home after the offence and telephoned her the next day. Thus it is true to say that many of the aggravating features of a rape were absent. It was also urged upon us that the appellant is allergic to pain-killing drugs, and that the sentence of caning ought to be set aside on this ground as well, since the consequences would be very painful if that part of the sentence were carried out.

In the event, we dismissed the appeal against sentence as well. Rape involves an element of depravity, and the more so does a double rape. There was more than a hint of premeditation - a game of forfeits with which the complainant was unfamiliar, resulting in her, a non-drinker, consuming two glasses of beer; dropping Jessica first when the complainant had expressly asked to be taken home; going to the High Street car park close to No 22, to which the appellant had access. It is clear, too, that the complainant was severely shocked, distressed and humiliated. The learned trial judge evidently looked at the two offences, in effect, as one transaction, and imposed sentences which cannot under any circumstances be described as manifestly excessive. We were not disposed to interfere with the sentence of caning on the grounds of the appellant's allergy to analgesics. That was not a matter which we were disposed to take into account, although it will no doubt have been borne in mind by those concerned with the execution of that part of the sentence, if drawn to their attention.

Appeal dismissed.

Solicitors: *Leo Fernando.*

Reported by *Terence Tan Bian Chye*

A-B Chew Investments Pte Ltd v Lim Tjoen Kong

HIGH COURT (SINGAPORE) - SUIT NO 10980 OF 1985
COOMARASWAMY J
31 JULY 1989

Civil Procedure - Summary judgment - Striking out of affidavits on ground that they referred to 'without prejudice' negotiations - Evidence Act (Cap 97, 1985 Ed), ss 17 & 23

Evidence - 'Without prejudice' privilege - Whether privilege waived - Reference to 'without prejudice' negotiations filed by party claiming privilege - Evidence Act (Cap 97, 1985 Ed), s 23

The plaintiffs claimed that they had made a contract with the defendant under which the latter agreed to purchase shares in SPP Ltd. The plaintiffs claimed that the defendant had breached the contract. Certain negotiations occurred between the plaintiffs' representatives and a broker, Khoo, (through whom the whole contract was allegedly arranged) and another person ('the negotiations'), the exact happenings and effect of which was in dispute between the parties. The plaintiffs applied for summary judgment against the defendant while the defendant applied to strike out the plaintiffs' statement of claim on the ground that he was not a party to any contract with the plaintiffs. An affidavit filed by the defendant referred to the negotiations. The plaintiffs filed an affidavit disputing the version of the negotiations in the affidavit filed by the defendant. The defendant then filed two affidavits which countered the plaintiffs' affidavit.

The assistant registrar heard both applications and struck out several paragraphs of the affidavits filed by the plaintiffs for the proceedings on the grounds that the contents referred to negotiations which had been conducted 'without prejudice'.

The plaintiffs appealed to the High Court. The defendant contended that although affidavits tendered by him referred to 'without prejudice' negotiations, the privilege is not waived simply by filing an affidavit which makes reference to privileged matters.

Held, allowing the plaintiffs' appeal:

(1) The issue before the court was whether the privilege

attaching to negotiations could be claimed by the defendant. Khoo's affidavit filed by the defendant in aid of the application to strike out stated that the defendant was not a party to the negotiations. However, the affidavit also states that the defendant was represented by him at the negotiations.

(2) The law on the admissibility of 'without prejudice' statements is found in s 23 of the Evidence Act (Cap 97, 1985 Ed) ('the Act'). This section merely states a broad principle and does not specify detailed rules for which it is necessary to look at English law. Sir James Stephen's art 20 of the *Digest of the Law of Evidence* is, with immaterial differences, identical to s 23 of the Act. Sir James was the draftsman of the Indian Evidence Act which was the direct parent of the Singapore Evidence Act. In effect, therefore, the English common law on 'without prejudice' statements in civil cases is part of our law.

(3) The privilege only applies to statements by the parties and solicitors respectively acting for them. If a party took no part in the 'without prejudice' negotiations, either personally or through an agent, he cannot claim the privilege. There is a glaring inconsistency in the affidavits filed by the defendant on the crucial point of the defendant's participation which has not been satisfactorily explained.

(4) It is clearly established that the privilege can be waived with the consent of both parties. The privilege may also be waived by the person entitled to the privilege, either expressly or by allowing evidence to be given of matters in respect of which privilege might be claimed. Each case must be decided on its own facts and the conduct of the parties to decide if the privilege has been waived.

(5) A party cannot unilaterally waive privilege only to claim it later when his adversary responds by making further reference to the 'without prejudice' negotiations.

(6) The defendant cannot be allowed wilfully to breach the law on 'without prejudice' negotiations and then, when he finds the consequences to his disadvantage, make claim to the privilege.

(7) In this case, it was the defendant who opened the door of privilege by allowing reference to be made in their affidavits to the privileged discussions. The plaintiffs had merely sought to challenge the version given in the affidavits filed by the defendant. The defendant could have taken out an application to strike out then but did not do so. Instead, he filed a further affidavit which descended into details of what had actually transpired. He had thus waived the privilege.

(8) Public policy cannot allow a party who refers to 'without prejudice' negotiations in an affidavit or who files an affidavit by some other deponent, thinking that such reference is in his favour, to later, upon his adversary filing an affidavit with references that are to the initiator's disadvantage, claim privilege. If he were permitted to do so, much time would be wasted and unnecessary steps in pre-trial procedure would have to be taken.

[*Editorial Note*: The defendant has appealed to the Court of Appeal vide Civil Appeal No 91 of 1989.]

Cases referred to

1. *La Roche* v *Armstrong* [1922] 1 KB 485 (refd)
2. *McTaggart* v *McTaggart* [1949] P 94 (refd)
3. *Sobell* v *Boston & Ors* [1975] 2 All ER 282 (distd)
4. *Walker* v *Wilsher* (1889) 23 QBD 335 (refd)
5. *Computer Machinery Co Ltd* v *Drescher & Ors* [1983] 3 All ER 153 (refd)
6. *Cutts* v *Head* [1984] Ch 290 (refd)

Legislation referred to

Evidence Act (Cap 97, 1985 Ed) ss 17, 23

HE Cashin and *Goh Joon Seng* for the plaintiffs.
Harry Wee and *Lawrence Fong* for the defendant.

Cur Adv Vult

Coomaraswamy J: This appeal arises from the striking out of para 11 and paras 4 and 5 of the affidavits of Chew Beng Gim ('Chew'), a director of the plaintiffs, filed on 3 May 1986 and 17 May 1986 respectively. The affidavits were filed by the plaintiffs in reply to affidavits filed by the defendant.

Before the assistant registrar, there were two applications. One was by the defendant to have the statement of claim struck out based on the ground that he was not a party to any contract with the plaintiffs. The other was the plaintiffs' application for summary judgment under O 14. The assistant registrar ordered that the three paragraphs referred to above be struck out on the grounds that the contents therein arose in the course of 'without prejudice' negotiations between the plaintiffs, the defendant and their representatives.

Facts

The plaintiffs claim that by a contract made with the defendant, the defendant agreed to purchase the plaintiffs' shares in SPP Limited, a Singapore company. The contract was claimed to have been arranged through a broker, Khoo Chin Inn ('Khoo'). One of the terms of this contract was that the defendant would, pending completion in September 1983, service the interest charged on the plaintiffs' and Chew's overdraft accounts with certain banks. The plaintiffs contend that the defendant had failed to complete the purchase although he kept up the interest payments after the completion date had fallen due.

Defence

The defendant claims that he was not a party to the agreement with the plaintiffs as he was out of the country at the relevant time. He also denies making any interest payments to the plaintiffs' account. The defendant filed on 12 March 1986 an affidavit by Khoo to say that the plaintiffs' offer was in fact taken up by one Irwan Gozali, an Indonesian businessman.

Gozali confirmed this in his affidavit filed by the defendant on 14 March 1986 where he explained that the plaintiffs' option to purchase the shares was conveyed to him through Khoo sometime in June 1983. However, by October 1984, he had discovered that the shares had fallen heavily in value and that certain representations made to him by the plaintiffs were untrue. He thereupon sought to terminate the interest payments and to abandon the option. There followed a series of negotiations which forms the subject of the present application.

Negotiations

The fact of negotiations was first raised in Khoo's affidavit filed by the defendant on 12 March 1986. In it, Khoo stated that the option was cancelled after negotiations on behalf of Gozali and the plaintiffs. Gozali then filed an affidavit on 14 March 1986 reaffirming this at para 10:

> After a series of discussions between the plaintiffs and my intermediaries it was agreed in early December 1984 I could abandon the option provided I paid interest in the sum of $50,000 payable in two instalments and I duly paid the same.

This was challenged by the plaintiffs in Chew's affidavit filed on 3 May 1986. On the offending paragraphs, he said in para 11 of his affidavit:

> I crave leave to refer to para 10 of the affidavit of Irwan Gozali. The negotiations were carried out between the defendant himself and on his behalf by Khoo with Mr Subhas Anandan and were on the methods of payment of the shortfall represented by the agreed price of $2,278,400 less the total proceeds of $696,079 from the sale of SPP Ltd shares in the market. One of the proposals put forth by the defendant to Mr Subhas Anandan to pay the shortfall of $1,582,231 plus the outstanding interest was by way of transfer of three units of housing at One Tree Hill Gardens being developed by TK Lim Realty Pte Ltd, the defendant's company.
>
> Annexed hereto and marked 'F' is a copy of the telex from Khoo to Mr Subhas Anandan, a copy of the telex marked 'G' from Mr Subhas Anandan to the said Khoo and a copy of the letter from Khoo to Mr Subhas Anandan marked 'H' giving specifications and built-up area of the units offered by the defendant. The proposal was aborted as the development was encumbered and no satisfactory proposal to lift the encumbrances came from the defendant.

This sparked off a series of exchanges regarding what actually transpired at the negotiations and the identities of the parties involved.

In reply, on 15 May 1986, Khoo stated at para 9 of his affidavit filed that day by the defendant:

> As regards para 11 of the said affidavit, I deny that there was any representation made by me on behalf of the defendant to Mr Subhas Anandan who was acting for me in the without prejudice negotiations regarding the balance of the overdraft interest and not the alleged shortfall claimed against the defendant. Mr Subhas Anandan has certain buyers who were interested in the property referred to therein and had requested more particulars thereof.

In reply to the matters set out above, Chew sets out his own version at paras 4 and 5 of his affidavit filed by the plaintiffs on 17 May 1986:

> As to para 9 of this affidavit annexed hereto and marked 'CBG-4' is a draft prepared by Mr Subhas Anandan which incorporated one of the proposals made by the defendant for securing payment of the amount claimed by the plaintiffs by the issue of shares to the plaintiffs by Alethea Pte Ltd which shares were to be paid for by capitalization of the defendant's loans to his own family company.
>
> The proposal set out in 'CBG-4' fell through and the defendant offered to transfer three units of housing in the One Tree Hill Gardens. For this purpose I had a valuation of the units made. Annexed hereto and marked 'CBG-5' is a copy letter to Mr Subhas Anandan dated 25 January 1985 enclosing the valuation. The price of the units to be transferred to the plaintiffs was to be the payment of the amount of the plaintiffs' claim, the plaintiffs eventually agreed to take two units with the balance of its claim to be paid by the defendant in cash. I then instructed Messrs Goh Poh & Partners to help in drafting an agreement for this proposal. However, the searches showed that the property was encumbered to a limit of $5,000,000. Annexed hereto and marked 'CBG-6' is a copy of the company search on Alethea Pte Ltd showing the charges registered against the company and a copy of the certificate of title showing the encumbrances marked 'CBG-7'. Goh Poh & Partners then wrote to Mr Subhas Anandan on 30 July 1985 as per annexure 'CBG-8'.

The issue before me is whether the privilege attaching to these negotiations can be claimed by the defendants. It is not clear who the parties to the negotiations are. Khoo's affidavit filed on 12 March 1986 clearly intimates that the defendant was at no time a party to these negotiations and that the negotiations were between the plaintiffs, Khoo himself and Gozali. This is, of course, consistent with the defendant's assertion that he had never made any representations to the plaintiff concerning the sale of the shares or entered into any such agreement.

However, in para 3 of Khoo's affidavit filed by the defendant on 20 May 1986 in aid of the application to strike out, Khoo asserts that the defendant was also represented by him in the negotiations. This is clearly inconsistent with the earlier version put forth by him. It should also be noted that the defendant himself has not come forth to clarify the position in an affidavit.

The law on the admissibility of statements made 'without prejudice' or in 'without prejudice' negotiations is found in s 23 of the Evidence Act (Cap 97, 1985 Ed) which reads:

> In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

In the Evidence Act, an 'admission' is not necessarily a statement adverse to the party making it. Section 17(1) defines it as:

> An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances hereinafter mentioned.

Section 23 merely states a broad principle and does not specify detailed rules. For this, we must look to English law. Sir James Fitzjames Stephen, who drafted the Indian Evidence Act 1872, (the direct parent of our Act, originally enacted in 1893), also wrote a *Digest of the Law of Evidence* and his art 20 is, with immaterial differences, identical to s 23 of our Act. In effect, therefore, the

English common law on 'without prejudice' statements in civil cases is part of our law.

The privilege only applies to statements by the parties and solicitors respectively acting for them: *La Roche* v *Armstrong*.[1] If a party took no part in the 'without prejudice' negotiations, either personally or through an agent, he cannot claim the privilege. There is a glaring inconsistency in the affidavits filed by the defendant on the crucial point of the defendant's participation which has not been satisfactorily explained. I am satisfied that the defendant is not entitled to claim the privilege.

Although this ground alone is sufficient to dispose of the application, I am also of the view that the privilege has in any case been waived by the defendant. It is clearly established that the privilege can be waived with the consent of both parties: *McTaggart* v *McTaggart*.[2] The privilege may be waived by the person entitled to claim it, either expressly or by allowing evidence to be given of matters in respect of which privilege might have been claimed: 17 *Halsbury's Laws of England* (4th Ed) para 235.

It is abundantly apparent from the exchanges in the affidavits filed that both parties have delved at considerable length on the contents of the negotiations and have referred to matters which would otherwise be privileged.

The defendant contends that the privilege is not waived by simply filing an affidavit which makes reference to privileged matters. He cites *Sobell* v *Boston*[3] in support. In this case, the plaintiff filed an affidavit where he referred to a privileged discussion with the defendant. In reply, the defendant filed an affidavit to correct the plaintiff's version. The defendant also stated that the conversation was without prejudice. The plaintiff subsequently contended that the privilege was waived on the ground that the defendant had let in the evidence by giving his own version in his affidavit.

In making the finding that this did not amount to a waiver, Goff J (as he then was) observed at p 287:

> Where the evidence is given by affidavit the opposing party is faced with a dilemma. If he says, merely, 'I am advised that this is inadmissible and I need not answer it', then if the objection is overruled he must seek an adjournment which may not be allowed or which may be allowed only on adverse terms as to costs and if he does not, or if his application be not granted, he will be left with no evidence on his side. I cannot think that the privilege can be waived by an affidavit which says, 'I object that my opponent's affidavit is inadmissible because the matter it contains is privileged, but in any case should the evidence be received, I say that it is wrong, and this is my version'. Of course, when the affidavits are being read counsel should at once object, and if he allows the offending affidavit to be read without objection, he may well waive the privilege despite the form of his own affidavit, but here counsel for the defendants made it clear from the outset that he did object, and I only received the affidavits on this point de bene esse pending argument.

To my mind, these observations must be confined to the facts of the case itself. I do not think that Goff J was purporting to define the threshold of waiver. Each case must be considered on its own facts and the conduct of the parties.

There is yet another and a key way of looking at the facts in the case before me and the contentions of the parties which to my mind finally concludes the matter in the plaintiffs' favour. Public policy to my mind cannot allow a party to blow hot and cold. A party cannot unilaterally waive privilege only to claim it later when his adversary responds by making further reference to the 'without prejudice' negotiations. To put it in terms of the law of contract, when one of two parties to an agreement repudiates it, the other party has one of two options:

(a) he can either accept the repudiation and treat the whole matter as never part of any agreement; or,
(b) he can abide by the agreement and hold the party repudiating it to the agreement and the consequences of repudiating it.

The plaintiffs have chosen the first option. The defendant cannot be allowed wilfully to breach the law on 'without prejudice' negotiations and then, when he finds the consequences to his disadvantage, make claim to the privilege. This is what defendant's counsel attempted to do in argument before me when he said that the plaintiffs could strike out the objectionable paragraphs in the affidavits filed by the defendant. He went further by admitting the weakness in law of his case by saying, 'I will consent to them being struck out'. This is precisely what I meant when earlier I said that on this issue, a party cannot blow hot and cold.

In our case, it is the defendant who opened the door of privilege by allowing reference to be made to the privileged discussions in Khoo's affidavit filed on 12 March 1986 and Gozali's affidavit filed on 14 March 1986. The plaintiffs in Chew's affidavit filed on 3 May 1986 had merely sought to challenge the version given in the affidavits filed by the defendant. The defendant could have taken out an application to strike out then but did not do so. Instead, it replied with a further affidavit of Khoo's filed on 15 May 1986 which descended into the details of what had actually transpired. Rather than close the door of privilege, the defendant and his solicitors opened it even wider. By their conduct, they had waived the privilege.

In my view, public policy cannot allow a party who refers to 'without prejudice' negotiations in an affidavit (or who files such an affidavit by some other deponent) thinking such reference is in his favour, later, upon his adversary filing an affidavit with references to the initiator's disadvantage, to claim privilege. If he were permitted to do so, much time would be wasted and unnecessary steps in pre-trial procedure have to be taken.

I should, though the case is not directly material to the facts before me, refer to *Walker* v *Wilsher*[4] which decided

that 'without prejudice' communications should not be looked at by a court without the consent of both parties. It was a case of a without prejudice offer which the defendant successfully used at first instance to deprive the plaintiff of costs as the plaintiff recovered less than the offer. *Walker* v *Wilsher*[4] has in the very recent past been 'explained' and 'qualified' by Sir Robert Megarry VC in *Computer Machinery Co Ltd* v *Drescher*[5] at p 156 and by the Court of Appeal in *Cutts* v *Head*[6] as to be of little authority today.

For the reasons given above, I am of the view that this appeal must be allowed with costs here and below.

Appeal allowed.

Solicitors: *Goh Poh & Partners; Lee & Lim.*

Reported by *Terence Tan Bian Chye*

Loh Jue Tee & Anor v Low Chick Sum

HIGH COURT (SINGAPORE) - DISTRICT COURT APPEAL NO 87 OF 1987
CHAN SEK KEONG J
28 JULY 1989

Tort - Negligence - Motor accident - Issue of which party was at fault - Breach of Highway Code

Civil Procedure - Appeals - Trial court's finding of fact - Appellate court's ability to overturn findings

A pick-up van driven by the defendant and a motorcycle ridden by the second plaintiff were involved in a collision, as a result of which the first and second plaintiffs suffered injuries. The defendant was sued for damages. It was not disputed that the accident occurred as the defendant's van was making a left hand turn. The district judge dismissed the claim and held that the second plaintiff was responsible for the accident. The plaintiffs appealed. The plaintiffs argued that the judge had made inferences and it was open to the appeal court to overturn these inferences.

Held, allowing the plaintiffs' appeal:

(1) It is well established that an appellate court will not normally disturb the findings of fact of the trial judge based upon an evaluation of the oral testimonies of the parties and their witnesses as he is in a far better position to assess their credibility having seen and heard them. However, where the findings of fact on which the decision is based are themselves inferences from the primary facts, the appellate court is in as good a position as the trial judge.

(2) The judge's decision was not based on his assessment of the truth of the witnesses but drawn as inferences from the police reports of the parties.

(3) All findings of fact should depend on the relative probabilities of the testimonies of the witnesses in the light of such other objective evidence as may be relevant.

(4) Based on all the evidence, the court found that the defendant was in breach of r 74 of the Highway Code. He was totally to blame for the accident. The appeal was allowed with costs at the High Court level and below. The case would be remitted back to the trial judge for assessment of damages.

Case referred to

1 *Foong Yit Yoon* v *Yap Tiam & Anor* [1963] MLJ 104 (folld)

Johnny Seah for the plaintiffs.
Brij Raj Rai for the defendant.

Cur Adv Vult

Chan Sek Keong J: This is an appeal by the plaintiffs against the decision of the district judge dismissing the plaintiffs' claim against the defendant for damages for personal injuries suffered by the plaintiffs as a result of a collision between a pick-up van No GF 6713Y driven by the defendant and a motorcycle No AZ 3705 ridden by the second plaintiff with the first plaintiff as pillion rider.

The collision occurred along Clementi Road on 28 August 1982 at about 4.30pm near the entrance to Ngee Ann Technical College ('NATC'). At that junction, Clementi Road was a dual carriageway with three lanes going towards Bukit Timah Road and the other three lanes going in the opposite direction. Both the second plaintiff and the defendant reported the accident separately to the traffic police a few hours after the accident. The second plaintiff's report was as follows:

> On 28 August 1982 at about 1630 hours at Clementi Road, I was riding my motorcycle carrying one pillion (tel: 4684659), at a speed of about 60 km/h, travelling at the left lane of the road behind a pick-up GF 6713 turned without giving signal and I could not avoid but collided onto the front left side of the pickup.
>
> The motorcycle fell and my pillion was injured. Ambulance conveyed us to Alexandra Hospital. Nobody was injured in the pick-up. The pick-up was dented slightly on the left front part. No rain and visibility clear. That is all.

The defendant's report was as follows:

> On 28 August 1982 at about 4.15pm, I am driving along Clementi Road intending to make a left turn to Ngee Ann College. Whilst driving, before I made a left turn of Ngee Ann College, I switched on my left signal indicator, suddenly a motorcycle AZ 3705C came on my left side, whilst I was about to turn, the said motorcycle grazed onto the left side of my motor pick-up. As a result the motorcyclist's pillion was injured, on the hand and right leg. My motor pick-up left side was damaged, the side mirror broken.

At the trial, the testimony of the second plaintiff was substantially the same as what he had said in his police report save for the elaboration that the traffic was moderate and that the pick-up van was travelling in the middle lane of the three-lane road going towards Bukit Timah Road when the van turned suddenly into the entrance into NATC. He also said that he was not trying to overtake the van and that he could not remember which part of the van he collided into. He was asked to mark (which he did) the point of impact with an 'X' on the police sketch plan of the scene of accident. The first plaintiff, in his testimony, cor-